The New Federal Judicial Code

Address by

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The present federal judicial system had its inception in the Articles of Confederation of 1778, which, imperfect as they were, did contain the suggestion of a judicial power afterwards embodied in the Constitution. The changes wrought by the new Judicial Code cannot be fully appreciated without a reference to the various steps taken toward the expansion and practical application of this suggestion in the growth of the present system.

The Articles of Confederation did not create an independent government—hardly even the skeleton of a government. They were aptly termed "Articles of Confederation," since the union contemplated by them was a true confederacy—a mere league—much like the Achæan League or the Amphictyonic Council of Greece, the Hanseatic League of the Middle Ages and the numerous alliances between European powers—convenient as temporary expedients for protection against foreign aggression, but liable to be disrupted at any moment by the withdrawal of one of their elements. The title assumed of "The United States of America" was almost a misnomer, since they were united by no bond which could not be broken at the will of a recalcitrant state. It is true the union was declared to be perpetual, but no means were provided for securing its perpetuity, although no important action could be taken without the consent of nine states. It had no executive head, but a committee of the states was given limited executive power. It had no power to raise an army, except by requisitions upon the states, though it had power to build and equip a navy. It had no money to pay its soldiers and sailors, and no courts to enforce its commands. It had abundant power to borrow money,

but no funds to repay it, except by requisitions upon the several states, which were generally disregarded. Throughout its deliberations it was apparent that the jealousy of the states among themselves was second only to their hostility to the mother country, which was the occasion of their confederation. As little power as possible was given to Congress; as much as possible was reserved to the states. It was really formed for the single purpose of carrying on war with the mother country, and contained the seeds of its own dissolution when that purpose had been accomplished. As soon as the exigency which had called the states together had passed, the confederacy began to crumble in pieces. But in all this chaos of things granted, things half granted and things not granted at all, in the Articles of Confederation, there was a germ of a judicial system in the provision for appointing courts for the trial of piracies and felonies committed on the high seas, and for determining appeals in all cases of captures—which was really the origin of our admiralty jurisdiction—and the further power that Congress should be the last resort on appeal in all disputes and differences between two or more states concerning their boundaries, jurisdiction or any other cause whatever; and an elaborate scheme was set forth in the appointment of Commissioners or Judges. to constitute a court for the trial of these cases and their final adjudication. This was manifestly the forerunner of the original and now extensive jurisdiction of the Supreme Court of suits between the states, and the successor of the King in council who had theretofore passed upon disputes between the colonies.

That this judicial power, limited though it might have been, was actively exercised during the existence of the confederation, is evidenced from a number of cases found in the records, and notably that of the sloop *Active,* U. S. vs. Peters, 5 Cranch. 45, in which Chief Justice Marshall not only sustained the power of Congress to establish a court of appeal in prize cases, but held that it was superior to the state courts. In this case the Court of Admiralty, the Supreme Court and the legislature of Pennsylvania had all acted in defiance of the Court of Appeals

established by Congress, and Congress itself had refused to enforce the decree of its own court. The governor of the state even went so far as to call out the militia to resist the mandate ordered by the Supreme Court—an act which was met by the marshal summoning a posse of two thousand men to enforce its order. The legislature finally sounded a retreat and appropriated the money to pay the decree. A report of the cases in this Federal Court of Appeals is contained in the early pages of 2d Dallas. An analysis of these cases shows that there were 110 prize cases decided by the various commissioners of the Continental Congress, and the Court of Appeals. The business of this court, however, ceased with the treaty of peace of 1783.

The clause providing for the final determination of disputes between the states with respect to their boundaries was the occasion of much litigation, owing to the indefinite character of many of the royal grants, the imperfect delimitation of their frontiers, and the fact that the settled portions of two colonies might be separated by miles of unbroken wilderness inhabited only by savages and an occasional settler. So long as this state of things continued, an exact determination of their respective boundaries was of little importance, but as the population of the different colonies drew near together opportunities for friction were constantly increasing, and a judicial system became imperative.

To meet this exigency, the Congressional Court provided by the Articles of Confederation was adopted, and a number of cases were instituted, but one of which, however, proceeded to judgment. This was a suit between Connecticut and Pennsylvania, involving sovereignty over the Wyoming Valley, originally settled by colonists from Connecticut, who had remained in possession for ten years and until a military force was organized to drive them out. A state of war ensued, stockades and forts were erected, sieges undertaken, lives lost and prisoners taken. The case was finally submitted to Congress and was argued at Trenton for fifteen days before a court convened there, and the valley unanimously awarded to Pennsylvania.

So prolific of controversy was this provision of the Articles that at the time of the adoption of the Constitution eleven of the thirteen states were in litigation respecting their boundaries under their charters.

The steps taken by the confederation toward the foundation of a judicial system were supported by arguments especially applicable to each. The high seas belonged to nobody. They are the common property of all nations—a kind of no man's land—to use a solecism, and as Congress had power to build and equip a navy, it must have authority to condemn its prizes, and determine to whom the proceeds belonged. While several of the states did have admiralty courts of their own, their decisions were often conflicting, and animated as much by state pride as by a sense of justice. Its jurisdiction of disputes and differences between the states rests upon an even firmer foundation of necessity. The only alternative of such jurisdiction was war. That either of the two contending states should have power to settle the controversy in her own courts was simply inconceivable. A dispute which can be settled by one of the disputants without the consent of the other was never heard of. Hence it became absolutely necessary that Congress should act as arbiter.

An underlying difficulty connected with the whole judicial system of the confederation, if it can be called such, was that the Congressional Court had no officers to compel the execution of its decrees, and was forced to appeal to the state courts for assistance. Even if Congress had a claim in favor of the United States it could only enforce it through the state courts, and when the federal court made a decree, perhaps reversing the decree of the state court, it could only enforce that decree through the very officers of the state court whose decree it reversed. The state courts sometimes refused to enforce decrees of the federal court of appeal at all, and that court was powerless to enforce them itself. Congress could not punish offenses against the law of nations or even treason against itself or crimes against its postal or coinage laws, though power was given to establish postoffices and to coin and regulate the value of money.

It will be readily seen that this state of things was intolerable, and that the principal value of this system in the subsequent history of the country was its demonstration of the utter impracticability of carrying on an independent government without a judicial system of its own. It was really for the want of this, and of a revenue and treasury of its own that the calling of the Constitutional Convention became imperative to the continuance of a united government. Without these, the confederacy could not be called a nation.

The delegates to the Constitutional Convention of 1787 were absolutely united upon the one point of establishing a Supreme Court with supervising power, and for the special object of securing uniformity in the construction of the Constitution and laws of Congress. The results from the conflict and inharmonious decisions of thirteen different states upon questions where unity was indispensable, were thus happily avoided. The power of Congress to organize inferior courts was strenuously opposed, but was finally carried against the opposition of those who feared the subordination and final destruction of the state courts.

I do not propose to pronounce a general eulogy upon the work of this convention, or of the magnificent instrument which, as Adams subsequently remarked, was wrung from the grinding necessities of a reluctant people. Upon this subject panegyric has already exhausted itself. It is sufficient to say of the Constitution that each year it becomes more firmly imbedded in the hearts of the people, and that it is constantly receiving the flattery of imitation by new republics which have adopted it as a model for their own governments. Treating the first ten amendments as part of and supplemental to the original Constitution, the text of that instrument has been amended but twice, and but three times by addition to that text. I believe it is today the oldest written scheme of government in existence, except the Constitution of the Commonwealth of Massachusetts. We are interested, however, only in its judicial features.

The Supreme Court was vested with original jurisdiction in but two classes of cases.

1. Those affecting ambassadors and other public ministers and consuls.

2. Those in which a state shall be a party.

It was also granted such appellate jurisdiction as Congress should choose to authorize.

The jurisdiction of the inferior courts was limited in another paragraph of the same article. In it it was declared that the judicial power should extend:

1. To all cases arising under the Constitution and laws of the United States, and its treaties with foreign nations.

2. To such as affect representatives of foreign governments.

3. To all cases in admiralty.

4. To controversies in which the United States is a party.

5. To those between two or more states.

6. And finally to those dependent upon the alienage of one party, or diversity of citizenship, or the right to land under grants to different states.

No grant of criminal jurisdiction is expressly given, except the power to provide for the punishment of counterfeiting the securities and current coin of the United States, to define and punish piracies and felonies on the high seas and offences against the laws of nations. There is, however, a recognition of the power of Congress to enact criminal laws and defining expressly the crime of treason, and in various amendments to the Constitution, the right to an indictment and trial by jury is guaranteed, as well as immunities against excessive fines and cruel and unusual punishments. The power to make criminal laws may also be included in the express power granted by the last paragraph of Article I, Section 8, " to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constituion in the Government of the United States, or any Department or officer thereof."

It may be observed generally with regard to the grant of judicial power in the Constitution that, wherever power is given Congress to legislate, there is a corresponding power to make that legislation effective by investing its courts with authority

to determine questions arising under its laws, as well as to prescribe penalties, and punish those guilty of an infraction of such laws. There is unhappily in every community a class of men who find it to their interests to evade laws intended for the protection of the public, or to extend laws of a remedial character to cases beyond their scope and ordinary signification. Within the limits imposed by the Constitution Congress has full power to make its legislation effective.

The Constitution thus fulfilled its obligation to the country by defining the judicial power under that instrument. It became the immediate duty of Congress to create and organize the inferior courts provided by it, and to parcel out and distribute among them the new jurisdiction. Congress at its first session responded to this demand by the Judiciary Act of 1789. This was probably the most important and the most satisfactory act ever passed by Congress. The honor of drafting it belongs principally to Oliver Ellsworth, afterwards Chief Justice of the Supreme Court. While it has been several times amended and its phraseology changed, the general structure established by it has remained essentially unaltered for a hundred and twenty years. This itself is a magnificent tribute to the wisdom of the act and the foresight of its draftsman.

After prescribing the number of Justices of the Supreme Court, the act proceeds to divide the country into thirteen districts—one for each state—and three circuits, with a district court for each district, and a circuit court for each circuit, composed of two Justices of the Supreme Court and a district judge—evidently a court of great dignity and importance. Both of these were courts of first instance. To the district courts was given jurisdiction of admiralty and maritime cases and seizures for violation of the revenue laws; of certain suits of limited amount by the United States, and of all suits by aliens for torts. It was also endowed with a very limited criminal jurisdiction, which was extended in 1842 to all cases not capital.

To the circuit courts was allowed jurisdiction concurrent with the state courts of law and equity of suits involving over $500 in value, subsequently raised to $2000, and again to $3000, and

the United States are plaintiffs, or one party is an alien, or there is a diversity of eitizenship. Also a jurisdietion of criminal eases, not already bestowed upon the district eourts. This jurisdiction was also limited by eertain restrietions as to the venue, and as to eauses of aetion whieh had been assigned by the original party, whieh are still eontinued in foree. Provision was also made for the removal to the eircuit court of eases from the state eourts whieh might have been originally begun in the eireuit eourt.

The Supreme Court was vested with the original jurisdiction given by the Constitution, with a proviso in a few cases that it should not be exelusive. Power was also given to issue speeial writs of *scire facias, habeas corpus* and the like. An appeal was allowed from the distriet to the eireuit eourt in admiralty eases involving $300, subsequently redueed to $50, and a writ of error in civil cases involving $50, and also a writ of error from the eireuit to the Supreme Court in cases involving $2000.

By the 25th seetion, one of the most important and stoutly eontested of all, a writ of error was allowed from the Supreme Court to the highest state eourt wherever a federal right was claimed and a decision made adverse to such right. The constitutionality of this law was denied in a unanimous opinion of the Supreme Court of Virginia and affirmed in a unanimous opinion of the Supreme Court of the United States reversing that ease. It has furnished, partieularly sinee the adoption of the Fourteenth Amendment, a large number of the most important eases to the Supreme Court, and its constitutionality is now universally aequieseed in.

A singular provision of the 29th section requires that capital cases shall be tried in the eounty where the offense was committed, if it ean be done without great ineonvenience. This clause is probably unknown to most members of the Bar; has never been put in foree, and yet, has been earried through sueeessive revisions to the present day. It seems to belong to the lumber room of federal jurisprudenee.

The remainder of this famous act is taken up by details of organization and proeedure, sueh as the appointment of clerks,

marshals and district attorneys; the selection and empanelling of juries; the production of books and papers; the taking of depositions and the service of process, most of which remain practically unchanged. Indeed, the most wonderful thing about the act is that, while the number of districts and judges has been enormously increased, and its different sections have been broken up and rearranged, its phraseology altered, and the jurisdiction of the courts enlarged—notably by the inclusion of suits upon patents and copyrights and by cases arising out of the recent amendments to the Constitution—the leading features of the act and its general structure are practically the same as in 1789.

It will be noticed that by the Judiciary Act the power of the courts to issue writs of error is limited to civil cases. This remained the law until 1879, when the circuit courts were given power to issue writs of error to the district courts in criminal cases, and in 1889 the Supreme Court was authorized to issue writs of error to any court of the United States in capital cases. It may be said to the credit of the district and circuit courts that, in the ninety years in which their judgments were made final in criminal cases, I know no case in which it was charged that their power was oppressively exercised, and that a writ of error was finally allowed more from a conviction that a criminal ought not to be deprived of any remedy allowed to parties in civil cases, than from any belief that this power had been abused in practice. The same sentiment has brought about the establishment of a court of criminal appeals in England. Within certain limitations this power of review is certainly a proper one, though it is a mistake to suppose that under any conceivable system an innocent man may not occasionally be convicted. But the extent to which it has been exploited to secure reversals for technical reasons is an abuse which ought to be limited to a power of reversal where the appellate court can see upon a review of the case that an injustice had been done, or at least might be done if the judgment were affirmed. The reversal of convictions for technical errors not affecting the merits is a standing reproach to modern American jurisprudence.

The adoption of the Fourteenth Amendment to the Constitu-

tion imposed upon the states certain obligations which had long before been imposed upon Congress, and which had been recognized as familiar restrictions upon legislative power from time immemorial. It opened a door at once to writs of error from the Supreme Court to the state courts in cases wherein it was charged that the state legislature had transcended its power, by abridging the privileges or immunities of citizens or depriving them of life, liberty or property without due process of law, or denying any class the equal protection of the laws. In addition to this, Congress freely exercised the power given by the fifth section of this amendment, to enforce its provisions by appropriate legislation, and permitted suits and prosecutions connected therewith to be brought in the federal courts. This amendment has been an exceedingly fruitful source of litigation and many of the most important cases in the Supreme Court have turned upon the proper interpretation of these immunities.

Owing to a large increase of business following the Civil War, Congress, in 1869, created a circuit judge for each of the nine judicial circuits with power to hold the circuit courts and to hear appeals from the district court, which had hitherto been the duty of the associate justice assigned to each circuit.

In 1866 Congress authorized the appointment of commissioners "to revise, simplify, arrange and consolidate all statutes of the United States general and permanent in their nature." The result of their labors was the Revised Statutes of 1873—a production of great value to the profession and public, but which contained no legislation beyond what was incidental to breaking up the original sections, and redistributing their clauses under appropriate heads. The want of a convenient reference to existing legislation had long been felt, and could only be supplied by rummaging through some twenty volumes of Statutes at Large, or trusting to the accuracy of Brightley's Digest, which was then the *vade mecum* of every lawyer practicing in the federal courts. While the revision of 1873 was of great value to the profession in its condensation of all the existing statutes in a single volume, it was found to be so inaccurate in its details that shortly thereafter bills were passed by Congress correcting

some hundreds of errors found in the text, and in 1877 a new revision was authorized, and the work entrusted to Mr. Boutwell, who reported the revision in 1878 as a second edition to that of 1873. The mistake of attempting a revision of the entire statutory law in one act was made apparent to Congress by these revisions.

The constant and increasing accumulation of business in the Supreme Court, which had already left about 1500 cases upon the docket, created such an imperative demand for relief that, in 1891, Congress established a circuit court of appeals in each circuit, as courts of intermediate appeal between courts of the first instance and the Supreme Court; and made the court one of last resort in all except questions of jurisdiction, prize causes, capital criminal cases and constitutional cases.

There was in addition reserved to the courts of appeal a power to certify differences of opinion to the Supreme Court, as well as a corresponding power of the Supreme Court to order up cases by *certiorari*—a power frequently invoked, but very rarely exercised. The desire of a defeated party to have one more chance is only equalled by the reluctance of an overburdened court to grant it. The relief to the Supreme Court was immediate, and its docket was soon reduced from 1500 to about 500 cases. The pendulum, however, has already begun to swing the other way, and at the beginning of the last term the docket showed 690 cases ready for disposition. It is evident that the time is not far distant when some other method must be devised for restricting still further the jurisdiction of the Supreme Court.

The New Judicial Code had its origin in a commission authorized by Congress in 1897 "to revise and codify" the criminal and penal laws of the United States. This revision was passed in 1909 and became operative in 1910. While this commission was engaged in its duties, Congress in 1899 enlarged its powers by authorizing it to revise and codify the laws concerning the jurisdiction and practice of the courts, including the Judiciary Act of 1789, and the Amendments thereto. In 1901 Congress again enlarged its powers by authorizing it to

revise and codify all the permanent laws of the United States not only by omitting obsolete enactments, but by proposing changes in existing laws, with their reasons for the same. From the report of this commission it selected for separate consideration the "judicial title," which, upon its adoption became the Judicial Code, as a revision of the entire law was thought to be too great a task.

One who anticipates in a new judicial code, a complete reorganization of the federal judicial system, or other radical departure from the present historical plan, will probably be disappointed by an examination of the new code. The plan which for a hundred and twenty years has worked so successfully remains practically unaltered. The changes have been rather in form than in substance, and that marvelous creation—the Judiciary Act of 1789—slightly mutilated and much changed in phraseology, still throws about its litigants the aegis of its protection. It is still the resort of aliens, of citizens of different states, of patentees, authors, mariners and even bankrupts, under conditions which have not essentially changed since the act was passed. The great principles enunciated by Marshall and Taney have grown in favor with the lapse of years, from a halting acquiescence to a universal and cordial acceptance. The supremacy of the Supreme Court in cases involving the construction of the Constitution and laws of the United States, once so stoutly contested, is now a maxim of American jurisprudence. The theory that the highest court of the state may declare the invalidity of an act of the legislature, has, since the decision in Marbury *vs.* Madison, become the law of every state in the union.

May I add, as a former member of the court, that in my opinion the court, as at present constituted, has never been represented by abler or more conscientious men?

The most important change in the new Judicial Code consists in the abolishment of the circuit courts. As already observed, this was made by the Judiciary Act of 1789, a court of great distinction, held by two Justices of the Supreme Court and a district judge, with extensive appellate jurisdiction from

the district court. It was of great value in bringing home to the people of every state the dignity and power of the Supreme Court in the person of two of its justices. It was and continued to be for a century the great court of original jurisdiction. Its fall was brought about by a series of statutes changing its personel and shearing it of its appellate power. By the act of 1793, the attendance of one of the two associate Justices was dispensed with; but until the circuit courts were abolished, it was made the duty of the Justice of the Supreme Court to attend at least once in two years a term of the circuit court in each district in his circuit—a requirement far more honored in its breach than in its observance. Indeed, the increase in business in both the circuit courts and the Supreme Court made compliance simply impossible.

By the act of 1869, creating circuit judges in each circuit, a proviso was inserted that circuit courts might be held by the circuit justice or circuit judge, or the district judge, sitting alone, or together. This practice put an end to the superiority of the circuit court, though an appeal in admiralty was still reserved. Indeed, it had been ruled by Chief Justice Marshall as early as 1808, that a circuit court might be held by a district judge sitting alone, and such had been the constant practice for sixty years. It had been customary in all, except possibly a few of the largest districts, for the district judge to take up cases from both courts indiscriminately, and it was impossible for one not acquainted with federal jurisdiction, to tell in which court he was at the moment administering justice, although separate dockets and journals kept by separate clerks were provided for each. If a court possesses both original and appellate jurisdiction, it is pretty sure to become either an appellate court, or a court of first instance; and as the years passed by, the circuit court became more and more a court of original jurisdiction and less of an appellate court, until the circuit court of appeals was created, when its appellate character fell into abeyance and was transferred to the new court. The establishment of this court was really a *coup de grace* to the historical circuit court. It evidently became a mere question of time when the courts

should be consolidated, although from 1789 until the present day the jurisdictional distinction between the two courts was carefully observed, and a case brought into the wrong court would have been instantly dismissed.

Some criticism has been made of the abolition of the historical circuit court, but it appears to have arisen more from sentiment than from any fear of the practical operation of the measure. One objection of a somewhat serious character was, until amended at the last moment, deserving of special attention. That was the want of a central supervising authority over railways running through different districts, and subject in each district to the control of the district judge, whose jurisdiction is, of course, limited to his own district. Many of these railways, however, run not only through different districts, but through different circuits, and the difficulty of a harmonious management had been already encountered and successfully met by conferences between judges of these circuits. So far as concerns railways running through different districts or states within the same circuit, the exigency is seemingly met by section 56, providing that whenever a receiver is appointed of land or other property of a fixed character, lying in different states of the same circuit, his authority shall extend over all the property within the circuit, upon filing in each district a copy of the bill and the order appointing him, subject, however, to the disapproval of the Court of Appeals or Circuit Judge.

Of course, the clerk of the circuit court will share the fate of his court, but to offset this a large increase in the clerical force of the district courts will be necessary to meet the different classes of cases thrust upon it.

It should be noticed in this connection that, while the circuit courts are abolished, and it is contemplated that the only court of the first instance shall be held by the district judge, yet, wherever the business of a district court is too heavy for a single judge, a circuit judge may be designated to assist him, precisely as under the existing system, and a district judge may be designated to assist a circuit judge in another district.

A step in the direction of economy is found in a proviso that

there shall be but one clerk of the district court in each district, whereas, in eight of the original seventy-eight districts, there were from three to six clerks, each of whom was entitled to a maximum compensation of $3500. This particular kind of enterprise is discouraged by the code, which puts all upon an equality.

The 250th section strikes at an abuse which has existed ever since the creation of the Court of Appeals of the District of Columbia, by removing a discrimination which has occasioned much annoyance and loaded the docket of the Supreme Court with a large number of cases which had no proper place there. In an act establishing that court an appeal was given to the Supreme Court in every case involving $5000 regardless of the question at issue. This discrimination has been removed, and the appellate power of the Supreme Court limited to jurisdictional and constitutional cases, such as involve the construction or application of any law or treaty of the United States, or the validity of any authority exercised under the United States. This corresponds pretty nearly to the class of cases in which an appeal was allowed by the Circuit Court of Appeals act from the circuit and district courts, directly to the Supreme Court. The necessity for such restriction is apparent from the fact that under the present system about one case in every ten was brought up from the District of Columbia—a number grossly disproportioned to the population of the District as compared with that of the states.

A relic of an age long passed is also preserved in the 235th section, reserving to citizens of the United States the right to a trial by jury of all issues of fact. As no jury has ever been empanelled within the memory of any living man, and but one or two in the whole history of the court, this proviso is valuable chiefly to the archeologist. The section was probably allowed to remain upon the principle that it is sometimes wise to concede what is harmless as a means of conciliating opposition to what is really important.

The Circuit Court of Appeals, established under the act of 1891, performs the work of an intermediate appellate court,

which was originally intended to be performed by the circuit court when held by two Justices and the district judge. It is believed to have worked to the entire satisfaction of the Bar and of the country. Under the New Judicial Code, separate dockets will probably be required for different classes of cases, as in all the districts with which I have been acquainted separate dockets were kept in the circuit court for law and equity cases, and in the district courts, for admiralty, bankruptcy and criminal cases. This, however, is a matter of detail for each court to determine.

Another change made by the code, though less radical than the evolution of the circuit court, is one which will probably touch more closely the practice of every lawyer. It consists in raising the minimum jurisdiction in law and equity cases from $2000 to $3000. It has always been the theory of Congress, out of consideration for the convenience of defendants, and to prevent their being called from a distance to attend to trivial cases, to limit the amount of federal jurisdiction to a substantial sum, fixed originally at $500, raised in 1887 to $2000, and now to $3000. Considering the great fall in the value of money, this represents but little more than the original $500. Of course, this leaves untouched the power to have federal questions reviewed by the Supreme Court, whatever be the amount involved.

Under section 266 interlocutory injunctions against the enforcement of a statute of a state upon the ground of its unconstitutionality can only be granted upon a hearing before three judges, one of whom must be an Associate Justice or Circuit Judge, of which notice to the Governor or Attorney-General of the state is required.

These are the only practical innovations made by the new code upon the existing law. Other verbal and grammatical charges are numerous, but they are only such as were made necessary by the consolidation of the two courts of the first instance, and the repeal of obsolete statutes, for the better expression of the will of Congress. Certain chapters are added by way of revision of the existing laws respecting the Court of Claims, the Court of Customs Appeal and the Commerce Court,

but they have little connection with the general judicial system. The changes made in the previous acts establishing these courts are little more than nominal, and their revision does not fall within the scope of this paper.

It will be noticed that the code does not include chapters upon pleading, evidence or procedure, which, in accordance with the policy of Congress not to attempt too much at one time, are reserved for a separate code, which has been prepared and will be submitted to Congress at its next session.

Great credit is due to Congress and to the revisors, not only for the conservative character of the new legislation proposed by them, and for the preservation of the most valuable features of the system inaugurated by the Judiciary Act, but for their resistance to innovations, which experience teaches us beset every attempt to revise the laws from those who would avail themselves of the opportunity of incorporating the views of a particular class of men, who would seek by discrediting the courts to undermine and ultimately destroy the independence of the judiciary. In short, the advantages derived from the code are only exceeded by the evils it escaped.

Perhaps the most valuable feature of our Constitution is the complete separation of the powers of the government into the executive, the legislative and the judiciary, and the care exhibited to prevent encroachments by either upon another. It was no new invention, but years before it had been thoroughly exploited by Montesquieu in his "Spirit of the Laws," at that time the standard work upon political science. While in modern European governments the principle is still adhered to, in practice the executive power is so far commingled with the legislative power that the principal executive officers are chosen by the legislature from its own members, are responsible to it for their conduct, and are removable by its vote, though the nominal head of the executive power is the King, Emperor or President, as the case may be, who is irremovable. The system has undoubtedly worked well in England and her self-governing colonies, but has given to the Latin countries of Europe a popular impression of fickleness, wholly inconsistent with our ideas of a

stable government, and has sometimes resulted in a total change of administration two or even three times in a single year. Considering the somewhat mercurial temperament of our people and their disposition to yield to impulses of the hour, I think the framers of the Constitution were wise in assuring to our Chief Executive a fixed tenure of power, that his government may be given a fair trial and protected from the gusts of popular passion. To our English cousins, who are loud in their praises of government by responsible ministers, I can only say that in a trial of over a century our own system has earned the approbation of our people and enabled us to withstand the stress of a civil war, which would have imperilled every responsible government in Europe. Not only this, but it is the one feature of our government which has proved so entirely satisfactory that it is not only never criticised, but has been adopted by every one of the forty-eight states constituting the federal union.

Another feature of scarcely less importance is that providing for the popular election of all legislative officers, and the appointment by the President, subject to confirmation by the Senate, of all judicial and administrative officers. This method of appointing public officers was vigorously supported by Hamilton in his letters to the people of New York, published in the *Federalist,* and has been fully justified by the general honesty and efficiency of the appointees. Much has been said, and probably truthfully said, about graft and corruption in public offices, but in this particular I think the executive and judicial officers of the federal government would challenge comparison with those of any other country. Some exceptions undoubtedly occurred during the period of wholesale removals upon the incoming of each new administration, or what is popularly known as the "spoils system"; but since the establishment of civil service reform a notable improvement has taken place and charges of official corruption have been comparatively rare.

The constitutional method of selecting officers has been adopted as a model by practically every private business corporation in the country, whose stockholders choose by vote their

board of directors or legislative body, which in turn select a president from their own body, and he in his turn appoints the administrative officers, with the advice and consent of the directors.

The states, however, and their subordinate municipal bodies have generally adopted a different system, and one which Hamilton said would be readily admitted to be impracticable—namely, that of allowing the people themselves to choose their own officers. In a popular government this undoubtedly sounds pleasantly to the ear—in practice, it has been the origin of most of our woes. In many of the states this method of election obtains not only in the choice of a governor, where it is perfectly proper, but of all other state officers, the judges of all the courts, the sheriffs and other county officers, as well as the officers of all the municipalities. The argument is that every citizen may be assumed to know the respective qualifications of all the candidates, numbering frequently thirty or forty on a single ticket, and to choose his own with prudence and discretion. In practice, not a single voter in the entire state can know the qualifications of all the candidates on his ticket. In fact, a vast majority know nothing more than that the names have been placed there by a caucus of the party, and the voters are expected to approve of them upon pain of disloyalty. There would be some assurance of safety if these caucuses were composed of patriotic and intelligent men. As a matter of fact, they are usually manipulated by professional politicians, often of low grade, who are looking out for their own interests rather than those of the public, and selecting candidates far more for their availability than for their fitness. The result is inevitable. The candidates are often unfit—sometimes even corrupt—and the government carried on by them a scandalous system of bribery and profit sharing.

An attempt is being made to remedy this, for this is an age of experimental novelties in legislation, by a recall—a somewhat expensive and clumsy device, but one which may turn out to be of great service in disposing of unpopular officers. The public is quick to discover incapacity in a public officer *after* he is elected. It is hardly necessary to say to this audience that it is

inapplicable to the judiciary and utterly subversive of its independence, as no judge is fit for his place who lacks the courage to render an unpopular decision. A recall in such cases could easily be made the cover for the grossest abuses. The very idea that a judge could be compelled to descend from the Bench, and vindicate his right to retain his seat by an appeal to the public is the last recourse of political folly.

Just now the current of modern legislation is moving in two quite different, but by no means inconsistent, directions. First, by giving the people a more direct and immediate voice in the election of their law-making representatives—choosing Senators by popular vote, and also by a system of initiative referendum and recall, the success of which is purely problematical, and can only be determined after some years of trial. With regard to the popular election of Senators—the fashionable political fad of the day—I can only say that while election by the legislature has undoubtedly given us some bad men, it has, with as little doubt, produced a much larger number of honorable and eminent men who have contributed immensely to the prosperity and glory of the country. It may well be doubted whether a Senator chosen by a legislature may not more honestly represent his state and its people, than one chosen by a political caucus or a primary, and endorsed by popular vote.

The second, or what I may call the counter current of modern legislation, is toward a restriction of the power of the people to choose their executive officers by popular vote. This is proposed to be established either by what is known as the short ballot, or by the government of municipalities by commissions. The short ballot, as I understand it, contemplates the popular election of the head of the ticket, such as the governor, mayor, county commissioners or selectmen, and delegating to them the appointment of their own staff, instead of loading down the ticket with a lot of names of persons about whom one can know little or nothing. It would devolve the filling of these offices upon the head of the ticket. He would be in the position to inform himself of the qualifications of every candidate and would be held responsible by his constituents for a proper exercise of such

power. As already observed, this is the federal system which has obtained since the adoption of the Constitution, and has worked so satisfactorily that no serious effort has been made to change it. The wildly democratic ideas which began to prevail early in the last century, and finally culminated in the popular election of justices of the peace, constables, street commissioners and other petty officers, has begun to give place to saner views, which look more to the efficiency of those chosen than to the gratification of a popular whim in choosing them.

The government of municipalities by a commission is also being tried upon an extensive scale, and is apparently earning a deserved popularity. The District of Columbia has for over thirty years been governed upon this principle—and so well governed that no serious attempt has been made to change it. Congress is the supreme legislative power, and three commissioners appointed by the President (one of whom must be an engineer officer of the army), the executive, with full power of appointment and removal. The result is the best governed city in the country, and yet with a complete negation of the principles which have been adopted in most of the states. It was followed by Galveston, after the disastrous flood, which so nearly destroyed the city, and with such success that not only many cities in Texas, but over a hundred in different parts of the country have acted upon and profited by its example. Government by a commission is in substance an effort to remedy the evils created by making use of the ballot for purposes for which it was never designed. Municipal governments are really business corporations, and should be divorced as far as possible from politics, and conducted as private corporations. The argument is that, if the people may be trusted to elect the head of the ticket and its legislative officers, it may be equally entrusted with the choice of all its officers. But the analogy fails in a vital particular. The voter may be assumed to know the head of the ticket, either personally, or as the recognized head of his party, as well as the man whom he wishes to represent him in the legislative body, but he cannot possibly know the multitude of minor officers who are necessary for the conduct of a great

business. We can have no safer guide in this particular than the great charter of our liberty, under which we have grown and prospered for more than a century.

As the New England country lads who have abandoned their ancestral farms, and taken to the cities or to the west in search of quicker and easier returns, often find themselves duped by false promises and elusive hopes, and are beginning to exclaim, "Back to the farm!", so may not we, who have been lured by self-seeking politicians to forsake our ancient paths, and to believe that we are wiser than those we have deliberately chosen to speak for us, also find relief in the cry, "Back to the Constitution!" Here at least there is an assurance of peace, honesty and efficiency.